No. _____

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In The

Supreme Court of the United States

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October Term, 1994

RALPH LOPEZ, BEXAR COUNTY SHERIFF, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY,

Petitioner,

vs.

MARK S. VOJVODICH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Whether the court of appeals erred in failing to apply the exception to the bar on dismissal of public employees for party affiliation, which permits the dismissal or demotion of a policymaking public employee for whose position party affiliation is an appropriate requirement, and thus rendered an opinion in conflict with the opinions of this Court and other courts of appeals.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ralph Lopez, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dated March 30, 1995 reversing the grant of summary judgment in favor of the petitioner is

reported as *Vojvodich v. Lopez*, 48 F.3d 879 (5th Cir. 1995) and is reproduced in the Appendix. (App. 1-15)

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on March 30, 1995. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. § 1983, which are set forth in the Appendix. (App. 21-24).

STATEMENT OF THE CASE

Mark S. Vojvodich, the respondent, was employed by the Bexar County Sheriff's Office as a lieutenant in charge of the narcotics division of the sheriff's office when Ralph Lopez, the petitioner, took office as Bexar County sheriff. Several months later, petitioner transferred respondent to a position as head of the sheriff's communications unit at equal rank and pay. Respondent filed suit, alleging that the transfer was a demotion and that he was transferred because of his political affiliation with the former sheriff. The jurisdiction of the district court was invoked under

42 U.S.C. § 1983 and under 28 U.S.C. § 1331 (general federal question jurisdiction).

A. Statement of Facts

The pertinent facts, as brought out in the petitioner's motion for summary judgment and respondent's response to the motion for summary judgment, are contained in the opinion of the court of appeals, reproduced in the Appendix. (App. 2-6)

B. Proceedings Below

Respondent filed his complaint in the United States District Court for the Western District of Texas on May 3, 1993. The district court granted petitioner's motion for summary judgment based upon a finding that respondent was a policymaker. (App. 18-19) Applying the holding of *Elrod v. Burns*, 427 U.S. 347 (1976), the district court held that, because he was a public employee in a policymaking position, respondent's First Amendment rights were outweighed by the sheriff's interest in assuring that he has employees who will loyally implement his policies. (App. 18)

The court of appeals reversed. It assumed without deciding that respondent was a policymaker, but then went on to apply the principles of *Connick v. Myers*, 461 U.S. 138 (1983), relying on its own decisions in *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988 (5th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2275, 119 L.Ed.2d 201 (1992) and *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th

Cir. 1984), for the premise that *Connick* modified the policymaker exception test set out in *Elrod* and *Branti v. Finkel*, 445 U.S. 507 (1980). The court of appeals found that, because petitioner had failed to allege that respondent's activities affected the operations of the sheriff's office, there was "no countervailing interest to weigh against the employee's First Amendment rights." (App. 11-12) Therefore, in the *Connick* balancing test, respondent's interests prevailed. The court of appeals failed to acknowledge that other circuits disagree as to whether *Connick v. Myers* should be applied to all public employees' First Amendment rights cases. It vacated the summary judgment granted by the district court and remanded the case. (App. 15-16)

The question presented here is whether the court of appeals erred in failing to apply the exception to the bar on dismissal of public employees for party affiliation, which permits the dismissal or demotion of a policymaking public employee for whose position party affiliation is an appropriate requirement, and thus rendered an opinion in conflict with the opinions of this Court and other courts of appeals.

REASONS FOR GRANTING THE PETITION

The reasoning of the Fifth Circuit clearly conflicts with this Court's opinions, and with the decisions of other courts of appeals in similar cases. The Fifth Circuit has developed its own body of caselaw based upon its erroneous application of *Connick v. Myers* to all cases involving public employment decisions, regardless of

whether the employees are found to be policymakers. The case at bar provides this Court with an opportunity to provide acutely needed guidance to the Fifth Circuit, and bring it into harmony and consistency with this Court's decisions, and with the other courts of appeals. Moreover, the decision below is erroneous, and the issue addressed is important.

I. The Fifth Circuit's Application of *Connick v. Myers* to Policymaker Cases Squarely Conflicts With This Court's Precedents, and With the Decisions of Other Courts of Appeals.

In *Elrod v. Burns*, this Court carved out an exception to the general prohibition on political patronage that bars dismissal or demotion of public employees based upon political affiliation. The exception provides that the government's interests in ensuring that it has employees who will loyally implement the policies sanctioned by the electorate outweigh the employee's First Amendment rights when the employee is a policymaker or confidential employee. *See Elrod*, 427 U.S. at 367-68. *Branti v. Finkel* reaffirmed that principle, although it modified the test to state that political affiliation must be an appropriate requirement for the particular job. *Branti*, 445 U.S. at 518.

Without denouncing the *Elrod-Branti* principles, the Fifth Circuit has succeeded in nullifying their effects by making a distinction between political affiliation and political activity. The Fifth Circuit has held that only the former receives the *Elrod-Branti* analysis. *See Soderstrum v. Town of Grand Isle*, 925 F.2d 135, 141 (5th Cir. 1991). If any

political activity is alleged, as in the case at bar, the Fifth Circuit applies the balancing test propounded in *Connick v. Myers*, 461 U.S. 138. *See, e.g., Kinsey*, 950 F.2d at 993; *McBee*, 730 F.2d at 1015-16. In the present case, the court of appeals proceeded on the basis that respondent was a policymaker, yet went on to apply the *Connick* balancing test. (App. 7-12)

Connick v. Myers, 461 U.S. 138, was a speech case, not a patronage case. It addressed a public employee's First Amendment rights in a situation where that employee was not alleged to be a policymaker. *See id.* It did not address the policymaker exception of *Elrod-Branti*, nor did it indicate, explicitly or implicitly, any modification of the *Elrod-Branti* principles. Furthermore, this Court reaffirmed its rulings in *Elrod* and *Branti* in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), a case which was decided after *Connick*. *See id.* at 74. The Fifth Circuit's refusal to follow this Court's rulings in *Elrod* and *Branti* demonstrate the clear conflict between the Fifth Circuit and this Court's precedents.

The Second, Third, Sixth and Seventh Circuits have decided cases concerning patronage actions as to policymakers utilizing the analysis set forth in *Elrod* and *Branti*, without reference to *Connick*.[1] Although the courts of

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[1] *See, e.g., Kolman v. Sheahan*, 31 F.3d 429, 431 (7th Cir. 1994); *Vezzetti v. Pellegrini*, 22 F.3d 483, 486-88 (2nd Cir. 1994); *Peters v. Delaware River Port Auth. of Pennsylvania and New Jersey*, 16 F.3d 1346, 1352-58 (3rd Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 62, 130 L.Ed.2d 20 (1994); *Rice v. Ohio Dep't of Transp.*, 14 F.3d 1133, 1138-40 (6th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2678, 129 L.Ed.2d 812 (1994); and *Heideman v. Wirsing*, 7 F.3d 659, 661-62 (7th Cir. 1993).

appeals decided *Vezzetti, Peters, Rice, Kolman* and *Heideman* after the *Connick* decision was handed down, neither the Second Circuit, the Third Circuit, the Sixth Circuit nor the Seventh Circuit found the *Connick* balancing test appropriate. Furthermore, the Fifth Circuit's position that *Connick* modifies *Elrod-Branti* has been expressly rejected by other courts of appeals.[2] There is clearly a direct conflict between the Fifth Circuit and other courts of appeals.

The Fifth Circuit has misapplied *Connick* to patronage cases, not only in the case at bar, but also in prior opinions, thereby building up considerable precedent. *See, e.g., Kinsey*, 950 F.2d 988; *McBee*, 730 F.2d 1009. Unless it receives direction from this Court, the Fifth Circuit can be expected to continue in its course of skewing the law regarding policymakers in its jurisdiction, thus jeopardizing the rights of public employers to employ loyal persons in politically sensitive positions.

The Fifth Circuit's decision below is in direct conflict with the decisions of this Court, as well as those of other courts of appeals in similar cases. The Court should grant certiorari to review and resolve these important conflicts.

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[2] *See, e.g., Horton v. Taylor*, 767 F.2d 471, 480 (8th Cir. 1985) (stating that Fifth Circuit incorrectly decided that *Connick-Pickering* balancing test must now be applied to resolve all public employee discharge cases); *Livas v. Petka*, 711 F.2d 798, 800 (7th Cir. 1983) (holding that *Connick-Pickering* balancing test not appropriate in cases regarding dismissal of public employees for reasons of political patronage).

II. The Decision of the Court of Appeals is Erroneous.

The Fifth Circuit's refusal to apply the *Elrod-Branti* policymaker exception in this case was erroneous. The court of appeals assumed without deciding that the respondent was a policymaker, but went on to apply the *Connick* balancing test. (App. 7-12) It erroneously failed to hold that, as a policymaker, for whose job party affiliation was an appropriate requirement, respondent was subject to patronage actions pursuant to *Elrod-Branti*. The Fifth Circuit applied *Connick v. Myers* to this case despite this Court's demonstration in *Rutan*, 497 U.S. 62, that the *Elrod-Branti* exception was not modified by *Connick*.[3] The Fifth Circuit found that petitioner had no countervailing governmental interest to weigh against respondent's First Amendment rights and that, therefore, the petitioner could not prevail. (App. 12) If there is nothing to be balanced, a balancing test is of little use. The Fifth Circuit's holding that respondent's interests must be balanced pursuant to *Connick* is erroneous.

The summary judgment evidence before the court of appeals clearly demonstrates that the job functions of the

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[3] The Fifth Circuit's misapplication of *Connick* has been recognized by commentators as well. *See, e.g.*, Isidore Silver, Public Employee Discharge and Discipline § 16.2 at 16-4 n.17 (1989) (characterizing the Fifth Circuit's application of *Connick* to patronage cases as a "blatantly incorrect decision that *Connick v. Myers* requires modification of *Elrod-Branti*"); J. Kendall Raburn, Note, *McBee v. Jim Hogg County: On Balance a Risky Business*, 45 La. L. Rev. 1095, 1100-06 (1985) (criticizing the Fifth Circuit's application of *Connick* to patronage cases).

head of the narcotics division in the Bexar County Sheriff's Office are those of a policymaker whose party affiliation is crucial for effective job performance. Applying the correct analysis to the case at bar, respondent is a policymaker and subject to political patronage actions pursuant to *Elrod-Branti*. The Fifth Circuit erroneously applied *Connick v. Myers* and incorrectly held that petitioner was not entitled to summary judgment on that basis. The Court should grant the petition to correct the Fifth Circuit's error.

III. The Question Presented is Important.

"To the victor belong the spoils of the enemy."[4] This often quoted battle cry, frequently cited in cases alleging patronage practices, has been gradually quelled, and the victor now learns only too soon that his is but a Pyrrhic victory for he must continue to employ policymaking employees hand picked by his defeated opponent who can not possibly be loyal to him.

Every four years, elections are held all across the county with new officials being sworn in a few months later. Typically, the first order of business for a newly elected official is to ensure that he is supported by a staff that is both efficient and loyal. While this Court, in *Elrod*, 427 U.S. 347, and *Branti*, 445 U.S. 507, recognized the importance of smooth transitions in government, as well as the need for loyal employees, and has set some guidelines, the courts of appeals, and more specifically, the

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[4] Attributed to William Learned Marcy, while governor of New York in 1829, in response to Jackson's inauguration.

Fifth Circuit, have over time begun to erode the policymaker exception carved out by this Court in *Elrod* and *Branti*.[5]

At present, a newly elected public official/employer is unable to determine what is required to properly dismiss or transfer a policymaking employee, with political affiliations to the ousted official, in whom the incumbent has lost confidence. Thus, the public official/employer must either replace the employee and risk lengthy litigation, thereby wasting time and the taxpayers' money, or continue to retain an employee whose party affiliation will affect the execution of his public duties.

Since 1983, when *Connick v. Myers*, 461 U.S. 138, was decided, there has been much confusion by the various courts as to whether this Court's holding in *Connick* extended or modified this Court's previous holdings in *Elrod* and *Branti* regarding the patronage dismissal of policymakers.[6] While the *Connick* decision, which was

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[5] *See generally, Kinsey*, 950 F.2d 988; *Soderstrum*, 925 F.2d 135; *McBee*, 730 F.2d 1009.

[6] *See generally, Kolman*, 31 F.2d at 431 (*Connick* not applied in determining whether patronage dismissal of public employee in policy making position was constitutional); *Kinsey*, 950 F.2d at 993; *Soderstrum*, 925 F.2d at 141 (finding that employee was "confidential employee" sufficient to find no violation of employee's First Amendment rights; issue of whether employee was a policy maker not addressed); *Finkelstein v. Barthelmy*, 678 F. Supp. 1255, 1259 (E.D. La. 1988) (court applied a balancing approach to weigh a discharged district attorney's free speech and association rights against the government's interest in "loyal, trustworthy, and competent service"); *Horton*, 767 F.2d at 478-80; *Barnes v. Bosley*, 745 F.2d 501, 501-08 (8th Cir. 1984) (finding that *Pickering* balancing test is not necessary in

limited to the issue of free speech, cited *Branti*, which concerned the issue of political association, this Court's most recent decision in *Rutan*, 497 U.S. 62, which also regarded the issue of political association, does not apply the *Connick* balancing test utilized in free speech cases. Nevertheless, the courts have had great difficulty interpreting *Connick* along with its predecessors *Elrod*, *Branti*, and *Rutan*, given that they all involve First Amendment rights.

What has transpired throughout the various federal courts of appeals in the last twelve years since *Connick* has amounted to an indiscriminate application of this Court's holdings in *Elrod*, *Branti* and, more recently, *Rutan*, to political patronage dismissals or demotions involving policymakers. As Justice Stewart, joined by Chief Justice Rehnquist, predicted in his dissent in *Branti*, "[a] constitutional standard that is both uncertain in its application and impervious to legislative change . . . now control[s] [the] selection and removal of key governmental personnel." *Branti*, 445 U.S. at 525.

Presently, this Court is faced with an opportunity to dispel the uncertainty, and resolve the issue of whether employers are required to utilize the *Connick* balancing test when considering a patronage dismissal or demotion

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determining whether the First Amendment protects political affiliation as a requirement for government employment), *cert. denied*, 471 U.S. 1017 (1985); *McBee*, 730 F.2d at 1014-15 (holding that *Connick* requires a modification of *Elrod-Branti*); *see also* Martin, *A Decade of Branti Decisions: A Government Official's Guide To Patronage Dismissals*, 39 Am.U.L.Rev. 11, 23-42 (1989) (noting that the courts of appeals have devised various tests for patronage dismissal cases).

of a policymaker or whether the *Elrod-Branti* analysis should be utilized. The question presented is important to clarify the apparent confusion in the various circuit courts, to provide sufficient guidance to the numerous newly elected officials as to the controlling constitutional standard in patronage dismissal or demotion cases such as the one at hand, and to reverse the prevailing inequity surrounding the conflicting decisions on this issue.

CONCLUSION

For these reasons, the petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Mark S. VOJVODICH,
Plaintiff-Appellant,

v.

Ralph LOPEZ, Bexar County Sheriff, Individually and in his Official Capacity, Defendant-Appellee.

No. 93-8838.

United States Court of Appeals,
Fifth Circuit.

March 30, 1995.

Deputy sued sheriff under First Amendment, alleging that he was transferred because of his political activity and affiliation. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., granted summary judgment for sheriff, holding that because deputy occupied position of "policy maker" his First Amendment rights were outweighed by sheriff's interest in having loyal employee. Deputy appealed. The Court of Appeals, Robert M. Parker, Circuit Judge, held that: (1) there was no counterveiling state interest to weigh against deputy's First Amendment rights under *Connick/Pickering* test; (2) genuine issue of material fact on causation precluded summary judgment; and (3) sheriff was not entitled to qualified immunity.

Vacated and remanded.

Appeal from the United States District Court for the Western District of Texas.

Before HIGGINBOTHAM, SMITH and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

The plaintiff, Mark S. Vojvodich, brought this action against Sheriff Ralph Lopez, claiming that he was transferred from his previous position in the Bexar County Sheriff's Office because of his political activity and affiliation in violation of his First Amendment rights. The district court granted summary judgment in favor of the sheriff, holding that, because the deputy occupied the position of a "policymaker," his First Amendment rights were outweighed by the sheriff's interest in having a loyal employee. As it applied an incorrect legal standard in determining whether the deputy's rights were infringed, we vacate the district court's summary judgment, and remand for further proceedings.

I. BACKGROUND

Deputy Mark Vojvodich worked as a Bexar County Deputy Sheriff for over ten years, during which time he worked his way up the chain of command. In 1992, he was promoted to lieutenant and assigned as commander of the Narcotics Unit of the Bexar County Sheriff's Office (BCSO). The Narcotics Unit is a field command within the Criminal Investigations Division.[1]

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[1] Under Texas law, some sheriffs' departments, of which BCSO is one, may establish a civil service system for their employees. *See* Tex.Local Gov't Code Ann. § 158.032 (West Supp.1995). The BCSO elected to do just that. Accordingly, the Bexar County Civil Service System Commission was created. It adopted rules regarding various aspects of employment with the BCSO, including promotions, disciplinary, grievances, and "other matters" relating to employee advancement and benefits.

Over the years Deputy Vojvodich served as a delegate to the Republican National Committee and as a member of several republican organizations, including the Young Republicans Club and the Republican Mens Club. In 1992, Deputy Vojvodich actively campaigned for the re-election of then-incumbent republican sheriff, Harlon Copeland. Deputy Vojvodich served on Sheriff Copeland's campaign committee, attended political campaign events and fundraisers, associated with campaign staff at campaign headquarters, donated money to the campaign fund, and urged friends and associates to vote for Copeland. In the election, Sheriff Copeland was opposed by Ralph Lopez, a democrat.

That Deputy Vojvodich supported Sheriff Copeland was well known within the BCSO. In fact, on one occasion a Lopez supporter within the sheriff's office tried to

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Id. § 158.035. These rules announce, inter alia, a county policy to promote employees and to administer "all other matters affecting [their employment], including . . . transfers [and] demotion[s] . . . without regard to . . . political affiliation." Rules of Bexar County Sheriff's Civil Service Comm'n § 4, at 12 (Mar. 14, 1985, as revised through May 21, 1992). The rules also restrict somewhat the political activities of civil service employees.

These rules apply to all department employees except those positions that the sheriff specifically elects to exempt from the civil service system. The Bexar County Sheriff is entitled by law to exempt up to ten positions. *See* Tex.Local Gov't Code Ann. § 158.038(b). The defendant, Sheriff Ralph Lopez, did not choose to exempt Deputy Vojvodich's position as Narcotics Commander. Accordingly, Deputy Vojvodich held a "non-exempt" position within the BCSO; thus, the terms and conditions of his employment were governed by the rules. Sheriff Lopez does not allege that Deputy Vojvodich violated any rules, even though the deputy was active politically.

recruit Vojvodich to support Lopez's candidacy, but the deputy refused. On election day, however, Deputy Vojvodich's candidate was defeated. The voters of Bexar County elected Mr. Lopez sheriff, and he assumed his duties on January 1, 1993.

As part of the transition process, Sheriff Lopez asked Deputy Vojvodich to prepare a report on the operations of the Narcotics Unit. The deputy complied, preparing a forty-page report in which he proffered several recommendations. Concurrently, Deputy Vojvodich continued to direct the day-to-day operations of the unit. Vojvodich claims that, although he had opposed the election of Sheriff Lopez, he continued to serve loyally in his position as narcotics commander.

Sheriff Lopez claims that upon taking office he evaluated the performance of all units within the BCSO. This evaluation, Sheriff Lopez claims, revealed that the narcotics unit was not operating productively. Sheriff Lopez asserts that he and Deputy Vojvodich disagreed as to the appropriate manner of improving productivity. When the narcotics unit thereafter failed to demonstrate what the sheriff believed to be satisfactory progress, the sheriff transferred Deputy Vojvodich to head the Communications/Dispatch Division. The sheriff insists that the position to which he transferred Vojvodich was equal in prestige to the position previously held by Vojvodich in the narcotics unit.

Deputy Vojvodich claims that he was unaware that the sheriff was evaluating the unit. He also disputes the Sheriff's assertion that the two disagreed on how to improve the operations of the narcotics unit. Vojvodich

claims that at no time while he headed Narcotics did the Sheriff express dissatisfaction with his performance or that of the unit. In fact, Vojvodich claims, it was not until this litigation that he learned that he was transferred for alleged unsatisfactory performance. Unlike the sheriff, Deputy Vojvodich sees his transfer as a demotion.[2]

Deputy Vojvodich also claims that Sheriff Lopez either failed or refused to promote him to Night Chief, a position that was created during the tenure of the previous sheriff. According to Vojvodich, the Night Chief position was declared by the Civil Service Commission to be a non-exempt, Captain-level position. As such, Deputy Vojvodich argues that, according to the civil service system rules, he should have been promoted to the position because he was the top candidate on the applicable promotion list. Deputy Vojvodich was not promoted, however, and on Sheriff Lopez's recommendation the position was subsequently abolished.

Vojvodich insists that he was transferred and denied the promotion to Night Chief solely because he is a republican and because he supported Lopez's opponent in the general election. Vojvodich filed suit in federal district court alleging that Sheriff Lopez had violated his state and federal constitutional rights.

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[2] The former Chief of Criminal Investigations, James De Lesdernier, affirmed that, based on his law enforcement experience, "an involuntary transfer from the position of Narcotics Lieutenant to Communications/Dispatching Lieutenant would be a punitive transfer to a less desirable, less prestigious position." Deputy Vojvodich also stated that his new position offered less job satisfaction, fewer benefits, and that, in his view, the transfer was a "career setback."

Lopez disputes any retaliatory motive for his decision to transfer Deputy Vojvodich to Communications/Dispatch or for his recommendation to abolish the Night Chief's position. The sheriff states that he transferred Vojvodich from narcotics because he was not satisfied with the performance of the Narcotics Unit, he disagreed with Deputy Vojvodich regarding the organization of the unit, and he wanted better to utilize Vojvodich's knowledge of and interest in computers and communications technology. Sheriff Lopez likewise denies that any political animus motivated his recommendation to eliminate the Night Chief position, claiming that he favored abolishing the position because he believed it would cause an unnecessary expenditure of funds.

Sheriff Lopez moved for summary judgment on three grounds: that he is entitled to qualified immunity; that Deputy Vojvodich occupied the position of a "policymaker" and thus could be demoted because of his political activities; and that Vojvodich failed to produce evidence that he was transferred because of activities protected by the First Amendment. The district court granted the sheriff's motion based solely on the court's finding that the deputy was a policymaker and thus was subject to the action taken on the grounds of political activity. After so ruling, the court dismissed without prejudice the deputy's supplemental state-law claims. Deputy Vojvodich timely appealed the district court's ruling.

II. DISCUSSION

On this appeal, we review only the district court's summary dismissal of Deputy Vojvodich's federal-law

claims. We review a summary judgment by examining "the record under the same standards which guided the district cour "[3] Summary judgment is appropriate when no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law.[4] In determining whether the grant was proper, we view all fact questions in the light most favorable to the nonmovant. Questions of law are reviewed *de novo*.[5]

A.

We may assume without deciding that the district court's factual finding that Deputy Vojvodich was a "policymaker" was not clearly erroneous.[6] Even if this finding is supported, however, the district court erred by granting summary judgment in favor of Sheriff Lopez based solely on its finding that Vojvodich had occupied a policy making position. The district court apparently believed

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[3] *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir.1988).

[4] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

[5] *Walker*, 853 F.2d at 358.

[6] "Policymaker" has been defined, in part, as a public employee "whose responsibilities require more than simple ministerial competence, whose decisions create or implement policy, and whose discretion in performing duties or in selecting duties to perform is not severely limited by statute, regulation, or policy determinations made by supervisors." *Stegmaier v. Trammell*, 597 F.2d 1027, 1035 (5th Cir.1979). "[C]onsideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals." *Gonzalez v. Benavides*, 712 F.2d 142, 149 (5th Cir.1983) (quoting *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)).

that Deputy Vojvodich's First Amendment interests were necessarily outweighed by Sheriff Lopez's interests as a matter of law simply because it classified Vojvodich as a policymaker. That is not the case.

Although the fact that a public employee holds a policymaking position is relevant to the required balancing of interests, it is not the ultimate determination. In *Branti v. Finkel*,[7] the Supreme Court expressly rejected the categorical approach used here by the district court. The *Branti* Court explained that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for effective performance of the public office involved."[8] Indeed, the Supreme Court clearly indicated in *Branti* that "party affiliation is not necessarily relevant to every policymaking or confidential position."[9]

In *Connick v. Myers*,[10] the Supreme Court again addressed the First Amendment rights of public employees, and expressly adopted the balancing analysis first recognized in *Pickering v. Board of Education*.[11] Under *Connick* and *Pickering*, the court's task "is to seek 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern

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[7] 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).

[8] *Branti*, 445 U.S. at 518, 100 S.Ct. at 1295.

[9] *Id.*

[10] 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

[11] 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' "[12]

To assert the protections of the First Amendment, the employee must establish, as a threshold matter, that his speech or activity related to a matter of public concern.[13] In the present case, there can be no question that the claimed activity, associating with political organizations and campaigning for a political candidate, related to a matter of public concern.[14] If the plaintiff meets this burden, the employer then must establish that its interest in promoting the efficiency of the services provided by its employees outweighs the employee's interest in engaging in the protected activity.[15] This analysis in reality is a sliding scale or spectrum upon which " 'public concern' is weighed against disruption."[16]

We have repeatedly recognized that "a stronger showing of disruption may be necessary if the employee's speech more substantially involves matters of public

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[12] *Connick*, 461 U.S. at 142, 103 S.Ct. at 1687 (alteration in original) (quoting *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734).

[13] *Connick*, 461 U.S. at 146, 103 S.Ct. at 1690.

[14] *Coughlin v. Lee*, 946 F.2d 1152, 1158 (5th Cir.1991).

[15] *United States Dep't of Justice v. Federal Labor Relations Auth.*, 955 F.2d 998, 1005 (5th Cir.1992).

[16] *Click v. Copeland*, 970 F.2d 106, 112 (5th Cir.1992); *Matherne v. Wilson*, 851 F.2d 752, 761 (5th Cir.1988); *Gonzalez v. Benavides*, 774 F.2d 1295, 1302 (5th Cir.1985), *cert. denied*, 475 U.S. 1140, 106 S.Ct. 1789, 90 L.Ed.2d 335 (1986).

concern."[17] This Court has also noted that in "cases involving public employees who occupy policymaker or confidential positions . . . the government's interests more easily outweigh the employee's (as a private citizen)."[18] These general observations, however, do not negate the oft repeated warning that because of the wide variety of situations in which this issue might arise, each case should be considered on its particular facts.[19]

In evaluating particular cases, this Court has looked to the factors discussed by the Supreme Court in *Connick*. Although not intended to be the exclusive considerations, these factors include (1) the degree to which the employee's protected activity involved a matter of public concern, and the gravity of that concern, (2) whether close working relationships are essential to fulfilling the responsibilities of the public office and the extent to which the employee's protected activities may have affected those relationships, (3) the time, place, and manner of the employee's activities, and (4) the context in

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[17] *Gonzalez*, 774 F.2d at 1302 (citing *Connick*, 461 U.S. at 152, 103 S.Ct. at 1693); *see Kinsey v. Salado Ind. Sch. Dist.*, 950 F.2d 988, 994 (5th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2275, 119 L.Ed.2d 201 (1992); *id.* at 1000 (Goldberg, J., dissenting); *Matherne*, 851 F.2d at 761; *McBee v. Jim Hogg County, Tex.*, 730 F.2d 1009, 1017 (5th Cir.1984) (en banc).

[18] *Kinsey*, 950 F.2d at 994 (citing *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990)); *see also id.* at 998 (Higginbotham, J., concurring).

[19] *Connick*, 461 U.S. at 154, 103 S.Ct. at 1694; *Pickering*, 391 U.S. at 569, 88 S.Ct. at 1735; *McBee*, 730 F.2d at 1014.

which the employee's activities were carried out.[20] A proper consideration of these factors allows a court to balance the plaintiff's interest in the claimed protected activity against the alleged disruption caused by that activity to the effective and efficient fulfillment of the government's public responsibilities.

We have no doubt that the government has a "legitimate interest in maintaining proper discipline in the public service, to the end that its duties may be discharged with efficiency and integrity."[21] In addition, we recognize that "party affiliation may be an acceptable requirement for some types of governmental employment. Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency."[22] Likewise, a private citizen's right to freedom of speech, even political speech, "is not absolute, insofar as it conflicts with his role as a public employee."[23]

In the present case, however, Sheriff Lopez has failed to allege that the deputy's political activities had any effect whatever on BCSO operations. In fact, the sheriff

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[20] *See Connick*, 461 U.S. at 151-53, 103 S.Ct. at 1692-93; *Kinsey*, 950 F.2d at 995-96; *McBee*, 730 F.2d at 1013.

[21] *McBee*, 730 F.2d at 1013 (citing *Connick*, 461 U.S. at 150, 103 S.Ct. at 1691).

[22] *Branti*, 445 U.S. at 517, 100 S.Ct. at 1294; *see Soderstrum v. Town of Grand Isle*, 925 F.2d 135 (5th Cir.1991) (police chief's personal secretary served in position of confidence requiring complete loyalty).

[23] *Kinsey*, 950 F.2d at 992.

insists that Deputy Vojvodich's political activities were wholly irrelevant, and that his employment actions were based entirely on other, nonpolitical factors. Because the sheriff has not alleged that Vojvodich's activities actually or potentially affected the Sheriffs Office's ability to provide services, there simply is no countervailing state interest to weigh against the employee's First Amendment rights. Thus, we cannot affirm the summary judgment in favor of Sheriff Lopez on this basis.

B.

Sheriff Lopez also moved for summary judgment on the alternative grounds that (1) Deputy Vojvodich failed to produce evidence that his transfer was motivated by his political affiliation or activities, and (2) the Sheriff was entitled to qualified immunity. Because it granted summary judgment based solely on the finding that Deputy Vojvodich was a policymaker, the district court did not address either of these alternative grounds.

We may affirm a decision on grounds other than those upon which the district court ruled, so we next consider each of the arguments in turn. When we do so in light of the summary judgment record before us, we conclude that Sheriff Lopez has not established entitlement to summary judgment on either basis.

1. CAUSATION

Sheriff Lopez contends that Deputy Vojvodich failed to submit sufficient evidence to establish that Sheriff Lopez's actions were motivated by Deputy Vojvodich's

protected activities. To be entitled to summary judgment, Sheriff Lopez must show the absence of a genuine issue of material fact on the causation element of Vojvodich's claim. We hold that Deputy Vojvodich has presented sufficient evidence on this issue to create a question of fact for the jury.

To show that his political affiliation or activities motivated the Sheriff, Vojvodich provides evidence that (1) he was a republican, and Sheriff Lopez was a democrat, (2) he actively campaigned for the incumbent whom Sheriff Lopez eventually defeated, (3) his support of the incumbent's candidacy was well known within the BCSO generally, and in particular by Sheriff Lopez's supporters there, (4) within three and a half months after Sheriff Lopez assumed office, the Deputy was transferred to a less desirable position with diminished prestige and career opportunity, even though his performance evaluations were satisfactory and the Sheriff had expressed no dissatisfaction with his performance, and (5) within the same timeframe, other BCSO employees who opposed Sheriff Lopez's election were terminated. Based on this evidence, we conclude that a reasonable factfinder could infer that Sheriff Lopez's transfer of Deputy Vojvodich was substantially motivated by the Deputy's party affiliation or his political activities or both.

2. QUALIFIED IMMUNITY

Finally, we address Sheriff Lopez's contention that he is entitled to qualified immunity. State officials are protected by qualified immunity for alleged constitutional torts if their conduct does not violate clearly established

law effective at the time of the alleged tort.[24] The first step in this analysis is to determine whether the plaintiff has alleged a violation of a constitutional right at all.[25] As we have already discussed, absent a sufficient showing of disruption of the government's ability to provide services, Vojvodich's activity was constitutionally protected. In addition, we hold that a reasonable factfinder could find that political animus motivated the Sheriff's actions. Thus, Deputy Vojvodich has sufficiently alleged the violation of a constitutional right.

The second step in the qualified immunity analysis is determining whether the constitutional rights allegedly violated were clearly established at the time the events occurred. In *Click v. Copeland*,[26] we held that by January of 1988 the law was clearly established that a retaliatory transfer to a less interesting, less prestigious position could implicate the First Amendment, even if the transfer did not result in a decrease in pay.[27] As far back as 1985, the established law in this circuit has been that a public employer cannot retaliate against an employee for expression protected by the First Amendment merely because of that employee's status as a policymaker.[28]

In addition, by January 1992 at the latest, the law was equally clear that, regardless of whether an employee is a

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[24] *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

[25] *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991).

[26] 970 F.2d 106 (5th Cir.1992).

[27] *Id.* at 109-11.

[28] *Gonzalez*, 774 F.2d at 1301-02; *McBee*, 730 F.2d at 1016.

policymaker, a public employer cannot act against an employee because of the employee's affiliation or support of a rival candidate unless the employee's activities in some way adversely affect the government's ability to provide services.[29] Therefore, prior to March 1993, it should have been readily apparent to a reasonable sheriff that he could not retaliate against a policymaking deputy for exercising his First Amendment rights unless the deputy's activities had in some way disrupted the sheriff's department. Since Sheriff Lopez has alleged no disruption of governmental functions as a result of Vojvodich's activities, we cannot hold that he is entitled to qualified immunity in the face of Vojvodich's allegations, and we cannot affirm the district court's summary judgment in favor of the defendant on this basis.[30]

III. CONCLUSION

For the reasons given above, the summary judgment of the district court is VACATED and the case is REMANDED for further proceedings consistent with this opinion.

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[29] *See Kinsey*, 950 F.2d at 996; *id.* at 1000 (Goldberg, J., dissenting).

[30] *Click*, 970 F.2d at 112-13 (sheriff's failure to allege disruption fatal to his claim of qualified immunity).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MARK S. VOJVODICH, Plaintiff,	§	
v.	§	CIVIL ACTION NO. W-93-CA-159
RALPH LOPEZ, Bexar County Sheriff, Individually and in His Official Capacity, Defendant.	§	

ORDER

(Filed Nov. 17, 1993)

Plaintiff brings this action under the provisions of Title 42, United States Code, Section 1983 ("§ 1983"). He asserts that he was transferred from his position of Commander of the Narcotics Division of the Bexar County Sheriff's Department to a less desirable position as Commander of the Communications Division because of his political association with the former Sheriff. Defendant moves for summary judgment on the grounds that he is entitled to qualified immunity, that Plaintiff occupied the position of a policymaker, and that there is no direct evidence that Plaintiff was transferred due to his political affiliations or activities. Because the summary judgment proof presented establishes that Plaintiff occupied the position of a policy maker, there is no need to address the remaining issues.

I. SUMMARY JUDGMENT

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is in genuine dispute if the evidence would allow a jury to return a verdict for the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

The initial burden to demonstrate the absence of a genuine issue of material fact is on the moving party. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). This burden can be satisfied by establishing that there is an absence of evidence to support an essential element of the non-moving party's case. *Id.* Upon such a showing, the burden shifts to the non-moving party to establish that there is a genuine issue. *Id.* at 324. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

II. DISCUSSION

The first step in an analysis of a case such as this is for the employee to "demonstrate that his conduct addresses a matter of 'public concern.' " *Click v. Copeland*, 970 F.2d 106, 111 (5th Cir. 1992), *quoting Connick v. Myers*,

461 U.S. 138, 146, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983). This is an issue of law for the Court. *Id.*

> If the conduct does not touch a matter of public concern, the inquiry is at an end and a court will not scrutinize the reasons motivating the employer's action. If the employee survives this threshold, however, then the court must strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern [against] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Id., quoting Pickering v. Board of Educ., 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). However, if an employee holds a policy-making position, then his First Amendment rights are outweighed by the employer's interest in assuring that it has employees who will loyally implement policies – policies which are "presumably sanctioned by the electorate." *Elrod v. Burns*, 427 U.S. 347, 367, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

In determining whether an employee is a policy-maker, the Court must evaluate the nature and number of responsibilities associated with the position, such as whether the employee supervises other employees, whether the employee's responsibilities are well-defined or broad-scoped, and whether the employee "acts as an adviser or formulates plans for the implementation of broad goals." *Id.* at 367-68.

The evidence presented at the preliminary injunction hearing and by affidavit persuades the Court that Plaintiff did occupy a policy-making position. As the head of

the Narcotics Division, Plaintiff was asked and gave advice for the effective implementation of the division's goals or enforcing narcotics laws. Plaintiff further compiled a 40-page study for Sheriff Lopez which made recommendations regarding the future course of the unit. Additionally, after Sheriff Lopez took office, Plaintiff was given discretion in the use of the unit's employees and resources to enforce the narcotics laws.

Plaintiff argues that his position should not be classified as a policy maker because it is classified as "non-exempt" under the Bexar County Sheriff's Department Civil Service System and under the wage and hour regulations of the U.S. Department of Labor. However, classification as "exempt" under local civil service rules, or under the regulation of the Department of Labor, does not, in and of itself, indicate that a position is or is not a policymaker. "Under *Elrod* the question of whether a particular public employee is a policymaker can be answered only by analyzing the nature of the employee's responsibilities." *Stegmaier v. Trammell*, 597 F.2d 1027, 1035 (5th Cir. 1979). As the Court has already noted, an analysis of Plaintiff's responsibilities as Narcotics Commander clearly indicates that he was a policymaker, regardless of how the position was otherwise classified by the Civil Service System. There is no issue of fact in this regard. Accordingly, it is

ORDERED that Defendant's Motion for Summary Judgment is **GRANTED** as to Plaintiff's federal claims. Plaintiff's remaining state law claims are hereby **DISMISSED** without prejudice.

SIGNED this 17th day of November, 1993.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
United States District Judge

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer

of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

§ 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.